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Nos. 91-261 and 91-274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

## BRIEF FOR RESPONDENTS

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## ALTERNATIVE QUESTION PRESENTED

Petitioners have misstated the true question presented in this case. The most significant issue before the Court is whether the process of private sector collective bargaining, previously characterized by this Court as the "cornerstone" of the National Labor Relations Act, will be protected from direct governmental interference in the form of union-only bid specifications for the construction of public works.

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## BRIEF FOR RESPONDENTS

## STATEMENT OF THE CASE

Respondents (hereinafter "ABC") are individual non-union construction contractors and trade associations representing over 18,000 "merit shop" construction industry employers.[1] On March 5, 1990, ABC filed a Complaint and

[1] Most, though not all, ABC members are non-union companies. The guiding principle of the "merit shop" is that all construction work should be awarded and performed on the basis of merit, regardless of labor affiliations.

Motion for Preliminary Injunction against The Massachusetts Water Resources Authority ("MWRA"), Kaiser Engineers, Inc. ("Kaiser"), and the Building and Construction Trades Council (the "Trades Council") in connection with a $6.1 billion series of construction projects known as the Boston Harbor clean-up.

The Complaint and Motion challenged enforcement by the MWRA, a governmental agency, of certain provisions of an agreement negotiated by Kaiser on MWRA's behalf with the Council. That agreement, known as the Boston Harbor Project Labor Agreement (hereinafter the "Project Agreement"), had been incorporated into the bid specifications for all construction work on the Boston Harbor clean-up project. (MWRA Pet. App. 75a.). The challenged provisions require all bidders on the Projects to agree to be bound by one of several dozen union collective bargaining agreements, which are incorporated by reference. These union contracts contain forced membership and hiring hall requirements for all employees and impose restrictive work rules and benefit plan contribution requirements on all signatory employers. (MWRA Pet. App. 5a-6a)[2]

ABC's Motion for Preliminary Injunction did not seek to halt the clean-up project in any way or to delay the advertisement or award of project contracts. (J.A. 37). Nor did ABC seek an order enjoining the entire Project Agreement. Rather, ABC's Motion asked only that the district court enjoin enforcement of

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[2] By letter dated September 21, 1989, Respondent Fraser Engineering had protested enforcement of the MWRA Agreement to the Massachusetts Department of Labor and Industries ("the Department"). (Jt. App. 26). In the course of reviewing this protest, the Deputy General Counsel of the Department's Civil Division concluded, *inter alia*, that the Agreement constituted governmental interference with collective bargaining in violation of the National Labor Relations Act. (Jt. App. 96-97). On February 16, 1990, however, the Department of Labor and Industries denied Fraser Engineering's protest, albeit without commenting upon the Civil Division's concerns about federal preemption. (Jt. App. 26, MWRA Pet. App. 94a).

the Project Agreement to the extent that the Agreement required non-union contractors to agree to recognize and be bound by local union contracts as a condition for obtaining work on the Project. (J.A. 37).

On April 11, 1990, the district court denied ABC's motion. (MWRA Pet. App. 72a). On October 24, 1990, however, a unanimous panel of the United States Court of Appeals for the First Circuit issued an opinion and order enjoining enforcement of MWRA Bid Specification 13.1 in connection with the Boston harbor cleanup project. (MWRA Pet. App. 49a). The panel found that the Bid Specification was preempted by federal labor law, because it impermissibly interfered with and "virtually eliminated" the collective bargaining process between private employers and unions. (*Id.*)

On rehearing en banc, the First Circuit reaffirmed that Bid Specification 13.1 was unlawful because it did not fall within any exception to the preemption doctrine articulated by this Court in *Golden State Transit Co. v. City of Los Angeles*, 475 U.S. 608 (1986), *after remand*, 493 U.S. 103 (1989); and *Wisconsin Dep't. of Indus. v. Gould*, 475 U.S. 282 (1986). Associated Builders & Contractors of *Massachusetts/Rhode Island v. Massachusetts Water Resources Authority*, 935 F.2d 345 (1st Cir. 1991). (MWRA Pet. App. 1a).[3]

It is undisputed in this case that the MWRA is a governmental agency authorized by the Massachusetts legislature to provide water supply services and sewage collection, treatment and disposal services for the eastern half of Massachusetts. (MWRA Pet. App. 51a-52a). MWRA's responsibility for the Boston Harbor clean-up project is set forth in the

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[3] The First Circuit's decision was followed in *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991), but was not adhered to in *Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co.*, No. 91-5527 (6th Cir. June 11, 1992) and *ABC v. City of Seward*, No. 91-35511 (9th Cir. June 5, 1992).

MWRA's enabling statute, Mass. Gen. Laws Ch. 92, app. § 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws. Ch. 149, §§ 45A-45L and Ch. 30, § 39M. Pursuant to these laws, the MWRA owns the property, provides the funds for construction (assisted by state and federal grants), establishes all bid conditions, awards all contracts, pays the contractors, and generally exercises ownership over all aspects of the Project. (MWRA Pet. App. 52a). The state's competitive bidding laws, reflecting the true interests of the state government, mandate that the MWRA award all construction work to the lowest responsible bidder through full and open competition. Mass Gen. Laws, Ch. 30, §§ 39M.

The MWRA does not employ any of the construction workers on the Project. (Jt. App. 72, 83-84). Because of this restriction, in April 1988, the MWRA appointed a "Project Contractor," defendant Kaiser Engineers, Inc. ("Kaiser"), to oversee the construction of new treatment facilities and the upgrading of existing facilities required for the clean-up. Jt. App. 22, MWRA Pet. App. 74a). Kaiser, in turn, acted as the MWRA's agent in negotiating contracts on the agency's behalf. Pursuant to state law, the MWRA retained total responsibility for the project, and all contractors were required to meet conditions set forth in MWRA's bid specifications in order to receive contract awards. (Jt. App. 23).

As noted above, the Boston Harbor clean-up "project" is actually a series of public works construction projects scheduled to take place in numerous locations around the Boston area during a 10-year period.[4] Together with the so-called Central

[4] Petitioners have chosen to highlight the work to be performed at Deer Island due to its supposed inaccessibility. (Pet. Brief at 6). In fact, the MWRA Agreement was imposed without regard to project location and affects numerous off-Island projects. Moreover, contrary to Petitioners claims, even Deer Island is accessible from multiple venues, so as to allow separate entrances for union and non-union workers, if necessary. (MWRA Pet. App. 96a).

Artery highway project, on which state officials proposed to implement an identical project agreement prior to issuance of the present injunction, the construction work at issue here constitutes a substantial percentage of the State's entire public works budget for the foreseeable future.

In November of 1988, two member unions of the defendant Building and Construction Trades Council ("the Trades Council") picketed the Project and precipitated a brief work stoppage. The work stoppage was ended after only one day by establishment of separate entrances to the job site, a well-recognized method of maintaining continuity of work in the construction industry. (MWRA Pet. App. 96a-97a). Other threats were made to disrupt the work, but *no other significant disruption actually occurred. Id.*

Nevertheless, on May 22, 1989, Kaiser, acting as MWRA's agent, entered into the Project Labor Agreement with the Trades Council.[5] No hearings were held by the MWRA prior to authorizing these negotiations, to determine the degree to which threatened union disruptions were likely to delay the project. Nor was any consideration given to alternative means of maintaining production, such as enforcement of performance bonds, termination for non-performance, or establishing reserved entrances. (Jt. App. 25).

Instead, acting outside the scope of the state's own competitive bidding laws, and in response to union political pressure, MWRA authorized Kaiser to negotiate the union-only Agree-

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[5] The General Counsel of the National Labor Relations Board, in response to an unfair labor practice charge brought by another party against Kaiser, stated that there was "no contention" in that case that Kaiser was MWRA's agent with regard to the Project Labor Agreement. *Building and Construction Trades Council*, GC Mem. Op. No. 1-CE-71 (June 25, 1990). (BCTC Pet. App. 83a). The record in the present case is clear, however, as evidenced in the Agreement itself, that Kaiser acted as MWRA's agent in negotiating the Agreement. (MWRA Pet. App. 75a).

ment. The Agreement states on its cover page that it was negotiated by Kaiser "on behalf of" the MWRA, and with MWRA's express approval. (MWRA Pet. App. 75a). Both Kaiser and the Trades Council understood that the Agreement could not be implemented without MWRA's approval. (Jt. App. 76, 82). Subsequently, the MWRA did approve the Agreement and incorporated it into all advertisements for bids on Project contracts. (MWRA Pet. app. 141a).

The Agreement, which all contractors and subcontractors who bid on the Project must agree to sign pursuant to Specification 13.1, requires that member unions of the defendant Trades Council shall serve as the sole and exclusive bargaining representatives for all craft employees on Project contracts (Art. III, § 1), that all employees must be referred by local union hiring halls (*id.* §§ 2, 3), that all employees are subject to the unions' compulsory membership provisions and local collective bargaining agreements (*id.* § 4), that employees must seek redress only through the named unions (Art. VII), and that employers are bound by each of the Trades Council member unions' wage and benefit provisions, including apprenticeship programs. (Art. IX, XI). Employers are also required to make contributions to a variety of union benefit trust funds and to observe restrictive union work rules and job classifications. (Art. IX). (MWRA Pet. App. 75a).

Moreover, because the Agreement is incorporated into the bid specifications for all work on the Project, contractors cannot *bid* for this government work without waiving their rights to negotiate freely with a union representing a majority of their employees. Thus, the MWRA Agreement forces the Respondents and other contractors, both union and non-union, to abandon their right to negotiate their own terms of employment or to operate on a non-union basis, in order to obtain work on this Project. In addition, contractors must agree to provide the

governmentally mandated union fringe benefits set forth in the incorporated collective bargaining agreements.

The "union-only" restriction imposed on all successful bidders and subcontractors, effectively deters non-union contractors from bidding on Project work. The imposition of specific contract terms adversely affects numerous union contractors as well, by dramatically increasing the bargaining leverage held by the unions over them in the future. (Any refusal to accept the union's renewal terms would preclude the employer from working on the next phase of the 10-year project).[6] Finally, the Agreement deprives employees of Project contractors of their rights under § 7 of the NLRA to choose their own collective bargaining representative without having a union imposed on them by governmental action.[7]

Approximately 75% of all construction work in this country is performed on a non-union basis. (Jt. App. 17). Only 21% of all employees in the construction industry are union members. *Id.* In Massachusetts, more than 60% of all construction work is performed on a non-union basis. (Jt. App. 62). Non-union employers and employees have performed hundreds

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[6] For these and other reasons, ABC was supported in its opposition to the MWRA Project Agreement by the Utilities Contractors Association of New England (UCANE), a group consisting of predominately unionized contractors which filed an amicus brief in the court below. UCANE, along with the Associated General Contractors, a national association also containing many unionized members, are also filing as amici in the present proceeding, together with numerous non-construction industry groups such as the U.S. Chamber of Commerce, the National Right to Work Legal Defense Foundation and the Master Printers of America.

[7] Contrary to the Solicitor General's Brief, at 20, n.14, the Agreement does not preserve the right "guaranteed" to employees by Section 8(f) to petition the Board for an election to reject the union representative. Instead, the Agreement *penalizes* employees who reject any of the government-imposed unions, by removing the employees (and their employer) from the government project.

of construction jobs in Massachusetts working side by side with union contractors, without significant labor disruption. (*Id.*)

In the present case, as noted above, Bid Specification 13.1 was enjoined by the First Circuit Court of Appeals in October 1990. Since that time, notwithstanding the prior concerns expressed by the MWRA as to the effects of the injunction, there is no evidence that construction on the project has been subject to delay of any kind resulting from the injunction against the MWRA's enforcement of the union-only Project Agreement.

## SUMMARY OF ARGUMENT

Petitioners have asked this Court to permit a government agency to impose union agreements on private construction contractors, upon threat of debarment from a large series of public works projects. In making this extraordinary request, Petitioners seek to rewrite thirty years of decisionmaking by the Court in the field of labor law preemption. Petitioners' basic arguments have previously been considered and rejected by the Court, and they must be rejected again, if the National Labor Relations Act's "free zone" around the process of collective bargaining is to have any meaning.

Contrary to Petitioners' claims, the 1986 decisions in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) and *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282 (1986) directly control the outcome here. In these decisions, the Court firmly established that governments are prohibited from regulating or otherwise interfering with the process of private sector collective bargaining. This prohibition has been given effect, regardless of whether the state governmental agency acts through its spending powers or engages in conduct which otherwise might be permitted on the part of a private actor.

More than any previous state activity confronted by this Court, the MWRA's union-only requirement goes to the heart

of the collective bargaining process. The Project Agreement not only tells private employers which unions they must deal with, but also dictates the terms of the agreements which must be reached and disallows any use of economic weapons to achieve better results. This is not a "legitimate response to procurement constraints", but is a wholesale destruction of the collective bargaining rights of private employers.

Petitioners and their amici seek to excuse the MWRA's conduct by claiming that Sections 8(e) and 8(f) of the NLRA somehow authorize governments to impose union-only agreements in the construction industry. The plain language of the Act utterly refutes their claim, and the meager legislative history cited by Petitioners from the 1950's fails to support their position. Indeed, inasmuch as state court decisions of that era uniformly *barred* state governments from engaging in union-only construction, and Congress made no effort to change this settled rule, the only logical inference from 8(e)'s passage is that Congress wished to keep the states out of the process of private sector collective bargaining. Finally, the law is clear that, even if the MWRA were a private owner/proprietor of the Boston Harbor project, 8(e) would not permit the agency to engage in the conduct presently at issue, because the MWRA would still not be a "construction industry employer", as 8(e) requires.

In sum, Petitioners and their amici do not seek to preserve traditional notions of federalism, but wish instead to overturn thirty years of settled law by allowing unprecedented government interference in the collective bargaining process. Such a result would be a disaster for taxpayers, businesses and employees and would undermine the fundamental purposes of the NLRA. The Court of Appeals properly rejected Petitioners' claims and the decision must be upheld.

## ARGUMENT

### I. SETTLED PRINCIPLES OF LABOR LAW PREEMPTION COMMAND THAT THE FIRST CIRCUIT'S DECISION BE UPHELD

Contrary to Petitioners' claims, the outcome of this case is plainly controlled by two decisions of this Court issued in 1986: *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), *after remand*, 493 U.S. 103 (1989); and *Wisconsin Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986). These cases, both of which are firmly grounded in years of prior decisionmaking by the Court, conclusively establish that governmental entities are prohibited by the National Labor Relations Act from regulating or otherwise interfering with the process of collective bargaining in the private sector. The Court's holdings further make it clear that such governmental conduct is prohibited regardless of whether the government acts through its spending powers or engages in conduct which would otherwise be permissible on the part of a private entity.

As is further discussed below, Petitioners' arguments, and those of the United States as *amicus*, repeat almost verbatim arguments which this Court considered and flatly rejected in *Golden State Transit* and *Gould*. There is nothing about the present case which distinguishes it in any principled way from this Court's prior holdings prohibiting governmental interference with the process of private sector collective bargaining. The Court properly decided this issue in 1986 and Petitioners' attempts to rewrite the doctrine of labor law preemption must fail.

#### A. *Golden State Transit* and *Gould* Squarely Support the Decision of the Court of Appeals

The controlling nature of *Golden State Transit* and *Gould* in the present case can best be seen by reviewing the local governments' contentions in those cases and the broad nature of

the Court's language in rejecting those contentions. In *Golden State Transit*, the City of Los Angeles refused to renew the operating franchise of a taxi cab employer unless and until the employer settled a disruptive labor dispute by entering into a collective bargaining agreement with a local union. In arguments to this Court, the city asserted that it was not "regulating labor" but was simply "exercising a traditional municipal function in issuing taxi cab franchises." 475 U.S. at 618. Like the Petitioners here, the city further argued that it was protecting important local interests and was doing so in a manner which involved merely a "peripheral concern" of federal labor law. *Id.* at 612, 618, n.8.

In rejecting each of these arguments, this Court held:

> Free collective bargaining is the cornerstone of the structure of labor management relations carefully designed by Congress when it enacted the NLRA.... Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations.... A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power" ... or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."

*Id.* at 619. With regard to the city's attempts in *Golden State Transit* to distinguish between its own conduct and other forms of "regulation", the Court observed:

> [T]he fact that the city acted through franchise procedures rather than a court order or a general law is irrelevant to our analysis. Judicial concern has necessarily focused on the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted.

* * *

> "We recently rejected a similar argument to the effect that a state's spending decisions are not subject to preemption." [*Citing Wisconsin Department of Industry v. Gould, Inc.*]

*Id.* at 614, n.5 and 618. Finally, in dismissing the city's claim that its actions only involved a "peripheral concern" of Federal labor law, the Court stated: We hold that the city directly interfered with the bargaining process—a central concern of the NLRA. . . ." *Id.* at 618, n. 8.

Three years after *Golden State Transit I*, this Court reaffirmed its holding, after remanding for consideration of whether the taxicab employer's rights under the NLRA were enforceable against the city under 42 U.S.C. § 1983. *Golden State Transit Corp. v. City of Los Angeles (Golden State II)*, 493 U.S. 103 (1989). In holding that enforceable rights were indeed created, the Court further clarified and strengthened its initial holding, in language directly applicable here. As the Court stated:

> . . . Congress intended to give parties to a collective bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free of governmental interference. "[T]he congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct "must be free of regulation." The *Machinists* rule creates a free zone from which all regulation "whether federal or State," . . . is excluded.
>
> * * *
>
> The *Machinists* Rule is not designed . . . to answer the question whether state or federal regulations should apply to certain conduct. Rather, it is more akin to a rule that denies either sovereign the authority to abridge a personal liberty.

*Id.* at 111-112. Finally, the Court held, in language squarely applicable to the arguments being presented now by the Petitioners:

> The rights protected against state interference, moreover, are not limited to those explicitly set forth in Section 7 as protected against private interference. The NLRA has long been understood to protect a range of conduct against state but not private interference.

*Id.* at 110.

As noted above, *Golden State Transit* was the culmination of a series of cases prohibiting governmental interference with the process of private sector collective bargaining. The decision was soundly based upon principles set forth in *International Assn. of Machinists, Lodge 76 v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). *See also, Teamsters v. Morton*, 377 U.S. 252, 258-259 (1964); *Bus Employees v. Missouri*, 374 U.S. 74 (1963); and *Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951). In each of these and other cases, this Court acted to prevent states from dictating the outcome of collective bargaining in the name of "labor peace", where the state's action interfered with the parties' own rights to make use of "economic weapons", "a 'right of the employer as well as the employee'". *Machinists*, 427 U.S. at 147.

In *Golden State Transit*, the Court repeatedly cited the other significant preemption decision of 1986, *Wisconsin Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986). In *Gould*, the State of Wisconsin attempted to prohibit its agencies from entering into procurement contracts with persons or firms who had been found to have violated the National Labor Relations Act more than a certain number of times. This Court properly found the state's action to be preempted by the NLRA, applying principles first set forth in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

Again, arguments which the state made in the *Gould* case are revealing, as they mirror almost exactly the contentions of the Petitioners here. Specifically, the state argued that its refusal to deal with labor law violators escaped preemption because the refusal was "an exercise of the state's spending power rather than its regulatory power". 475 U.S. at 287. The Court replied that this was "a distinction without a difference". *Ibid.* The state also contended that its action was somehow protected by the "market participant" doctrine set forth in certain cases decided under the Commerce Clause. Again, the Court rejected this theory, holding: "[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Id.* at 289.

Finally, the state argued in *Gould* that its conduct should have been allowed, because the NLRA permitted *private* purchasers of contract services to engage in exactly the behavior for which the state sought approval, another argument relied on heavily by the Petitioners here. The Court squarely rejected the government's position in *Gould*, however, holding as follows:

> Government occupies a unique position of power in our society, and its conduct, regardless of form is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for Federal law to prohibit states from making spending decisions in ways that are permissible for private parties. [citations omitted]. The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. [citing *Machinists*]. The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system states simply are different from private parties and have a different role to play.

*Id.* at 290. Accordingly, the Court properly found that a state's refusal to deal with a private contractor, based solely upon actions of that employer regulated by the NLRA, was preempted.

As this Court has noted, and as the First Circuit properly held, the *Machinists* and *Garmon* doctrines, culminating in *Golden State Transit* and *Gould* respectively, are distinct theories under which the implied preemption of the NLRA is given its full effect. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985). It is significant, however, that on the issues of greatest importance to the present case, both of the opinions in *Golden State Transit* repeatedly cite to *Gould*, and *Gould* in turn cites to *Machinists*, thus unifying the two doctrines in a way which fatally undermines the Petitioners' claims.

Specifically, as noted above, the Court in *Golden State Transit* cited *Gould* in rejecting the city's contention that the particular form of its actions should somehow be distinguished from otherwise preempted "regulation". Whether viewed as a franchising action or a proprietary procurement, the Court correctly focused on the "nature of the activities affected," *i.e.*, private collective bargaining, rather than the "method adopted" by the state. *Golden State Transit I*, 475 U.S. at 614, n.5.

Similarly, in rejecting the city's claim that its actions should be judged by the same standard applicable to private sector conduct, the *Golden State Transit* opinion again cited *Gould* for the proposition that "the NLRA . . . has long been understood to protect a range of conduct against state but not private interference." *Id.*

In any event, both doctrines of labor law preemption conclusively support the decision of the Court of Appeals in the present case and compel rejection of the Petitioners' claims, which are almost exactly repetitious of arguments already settled by the Court. In the present case, the MWRA, like the City

of Los Angeles in *Golden State Transit*, has attempted to coerce private contractors into reaching agreements with labor unions, an action which clearly goes to the heart of the collective bargaining process. Indeed, in the present case the governmental entity has, in the words of the Court of Appeals, "eliminated the process altogether". Pursuant to the Project Agreement, the MWRA has named the unions with which the private contractors must deal, has dictated the terms of the agreements, and has disallowed all economic weapons necessary to alter the agreements. Such pervasive interference with collective bargaining far exceeds the actions which this Court prohibited in *Golden State Transit* and *Gould* and certainly should not be permitted.

Similarly, for the reasons stated in both *Golden State Transit* and *Gould*, the Court of Appeals was completely correct in finding that the government's actions were no less impermissible because their coercive effects arose under the guise of the exercise of state spending powers. *Golden State Transit*, 475 U.S. at 614; *Gould*, 475 U.S. at 286. Finally, the Court of Appeals properly followed this Court's holdings, that with respect to labor law preemption, the NLRA protects private employers against state interference, regardless of whether similar actions might be permissible on the part of purely private entities. *Golden State Transit II*, 493 U.S. at 110; *Gould*, 475 U.S. at 290.

As will be further demonstrated below, the Petitioners' attempts to distinguish *Golden State Transit* and *Gould* and to rewrite the Court's settled doctrines of labor law preemption are unavailing. From the plain language of this Court's decisions and the Act itself, it is clear that there is no basis for the MWRA's unprecedented intrusion into the collective bargaining processes of private contractors who seek only to do business with the state on fair and equal terms.

### B. The MWRA's Union-Only Requirement Does Not Fall Within Any Recognized Exception to Labor Law Preemption

Petitioners have argued that *Golden State Transit* and *Gould* are somehow distinguishable from the present case and that the MWRA's actions should be deemed to be "peripheral" to the interests regulated by the NLRA. (Pet. Br. at 25-26; Sol. Gen. Brief at 23-24). It is significant, however, that neither the Petitioners nor the Solicitor General have cited a single decision of this Court which has permitted either the state or federal government to impose collective bargaining agreements on private employers under *any* circumstances. Rather, this Court has made it clear that such direct interference with the process of private sector collective bargaining can never be deemed to be "peripheral" to interests regulated by the NLRA, because the collective bargaining process is the "cornerstone" of the Act. *Golden State Transit I*, 475 U.S. at 619.

For these reasons, Petitioners' reliance on such cases as *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *New York Tel. Co. v. New York Dept. of Labor*, 440 U.S. 519 (1979), is utterly misplaced. (Pet. Br. at 21-24). In these cases, the state actions at issue did not impose collective bargaining agreements or union recognition on private employers. Instead, the states in each case merely established some term of employment or otherwise took an action which only "related" to collectively bargained working conditions. *See Metropolitan Life Ins., supra*, 471 U.S. at 758 (state law designated minimum health care benefits); *Fort Halifax, supra*, 482 U.S. at 23 (state mandated severance benefits); *New York Tel. Co., supra*, 440 U.S. at 546 (payment of unemployment insurance to strikers); *see also Belknap v. Hale*, 463 U.S. 491 (1983) (dealing with strike replacements); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (allowing states to enjoin mass picketing and violence).

In the present case, however, the MWRA is intruding into the collective bargaining process in an all-pervasive and unprecedented way. The MWRA bid requirements do far more than "touch on" an area of labor relations. *Metropolitan Life Ins.*, 471 U.S. at 757. They establish how the process will work and with whom the employers must deal. The bid specification also removes all economic weapons from the employers' hands, and finally, the government here has dictated the outcome of the "negotiations". Under any conceivable reading of this Court's preemption doctrine, such governmental action cannot stand.[8]

For similar reasons, Petitioners' attempt to claim support for their position from *Gould's* references to "legitimate responses to state procurement constraints or to local economic needs," is completely misplaced. (Pet. Brief at 34). In observing that it was "not saying that state purchasing decisions may never be influenced by labor considerations," 475 U.S. at 291, the Court merely repeated settled *Garmon* principles which do not apply here. A state may well "touch upon" or "be influenced by" labor issues in its dealings with government contractors, but government is *never* permitted to tell those contractors with whom they must bargain and what they must agree to. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). That is not a "legitimate"

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[8] For this reason, Petitioners are simply wrong to claim that a "recasting" of *Golden State Transit's* facts into a "market transaction" would render the holding inapposite. (Pet. Brief at 35-36). If the city had merely refused to deal with the cab company "until satisfactory service was restored," as Petitioners suggest, then it would not have been conditioning its procurement of services on the company's entering into a collective bargaining agreement, as has occurred here. As the Supreme Court stated in *Golden State Transit*: "Our holding does not require a city to renew or to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective bargaining process." 475 U.S. at 619. In the present case, the MWRA has not "insisted that non-union companies provide satisfactory service;" it has debarred them altogether, based solely on their non-union status, without so much as an opportunity for them to perform.

governmental response but instead constitutes direct interference with private sector collective bargaining. Petitioners failure to recognize this distinction undermines their entire claim.

Finally, Petitioners and their amici seek to apply misguided notions of federalism to this case, citing numerous cases outside the context of labor law. (Pet. Brief at 20-22; Sol. Gen. Brief at 14). A review of this Court's decisions on preemption under different statutes, however, is of little value here, revealing only that each case turns significantly on its statutory context. *Compare Gade v. National Solid Waste Mgmt. Assn.*, 60 U.S.L.W. 4587 (1992) (OSHA standard found to preempt state law); and *Cippolone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703 (1992) (state laws relating to cigarettes found to be partially preempted). Thus, whatever may be the validity of Petitioners' claim that the Court is "reluctant" to infer federal preemption under other statutes (Pet. Brief at 21), that characterization is flatly wrong with regard to labor law preemption. In cases decided under the NLRA, the Court has repeatedly held that the Act creates a "free zone" around the process of private sector collective bargaining, protecting it from all governmental interference. *Golden State Transit II*, 493 U.S. at 111.

In any event, the present case does not present a true issue of federalism, because the *Machinists/Golden State* doctrine on which the Court of Appeals principally relied applies equally to federal and state government actions. As this Court held in *Golden State Transit*:

> The Machinists rule is not designed . . . to answer the question whether state or federal regulations should apply to certain conduct. Rather it is more akin to a rule that denies either sovereign the authority to abridge a personal liberty.

Id. at 112.

In short, the present case is not about "states' rights," but is about protecting the collective bargaining process from interference by government in general. This Court has held that the NLRA squarely prohibits any such governmental interference, and the MWRA's union-only requirement plainly runs afoul of this prohibition. For each of these reasons, the Court of Appeals decision should be affirmed.[9]

## II. PETITIONERS' ATTEMPT TO CREATE A SPECIAL CONSTRUCTION INDUSTRY EXEMPTION FROM THIS COURT'S SETTLED PRINCIPLES OF LABOR LAW PREEMPTION SHOULD BE REJECTED

Confronted with this Court's consistent prohibition against governmental interference with collective bargaining, as set forth above, both the Petitioners and their amici have attempted to rewrite history and create a special exemption for such governmental interference in the construction industry, relying on Sections 8(e) and 8(f) of the National Labor Relations Act. (Pet. Brief at 24-33; Sol. Gen. Brief at 19). According to the Petitioners: "In enacting NLRB Sections 8(e) and 8(f), . . . Congress expressly expanded the options available to the industry participants who advanced their economic interests. . . . By denying one option to public owner developers that is available to private owner-developers, the decision below places

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[9] Unlike Petitioners, the Solicitor General has frankly conceded that "a State could not require that an employer negotiate or be bound by a prehire agreement with a union as a condition of obtaining a state contract outside the construction industry." (Sol. Gen. Brief at 20, n.14). This concession seriously undermines Petitioners' claims that the MWRA's proprietary interests, in and of themselves, somehow exempt the state's conduct from labor law preemption. In any event, as is further shown below, there is no statutory basis for treating the construction industry differently with regard to prohibiting governmental interference with collective bargaining.

a restriction on Congress's intended free play of economic forces." *Id.* at 25.[10]

In order to draw support for their positions from the NLRA, however, Petitioners are forced to ignore the plain language of the Act and to distort its legislative history. The Petitioners also fundamentally misrepresent the history of governmental intrusion, or lack thereof, in the process of private sector collective bargaining. Finally, at crucial points in their analysis, Petitioners ignore important holdings of this Court which have expressly prohibited the results they seek to achieve.

### A. Congress's Passage of Sections 8(e) and 8(f) of the National Labor Relations Act Provides no Basis for Permitting Governmental Interference With Private Sector Collective Bargaining

The Court of Appeals correctly found that Sections 8(e) and 8(f) of the NLRA have no relevance to the decision in this case. (MWRA Pet. App. 24a-25a). By their express terms, these sections of the statute say nothing about the right of governments, state or federal, to dictate terms of collective bargaining agreements to private contractors. As Petitioners have conceded (Pet. Brief at 27), both sections deal only with permitted activities of "employers in the construction industry", whereas political subdivisions are expressly excluded from the definition of "employer" by Section 2(2) of the Act.

In light of this Court's previous holdings that the Act as a whole prohibits governmental entities from mandating or otherwise interfering with the process of collective bargaining between unions and private employers, it is Petitioners' burden to

[10] The Solicitor General similarly complains that the First Circuit treated state and local governments "differently from all other employers - and all other owners and developers of property - by uniquely prohibiting them from implementing the very sort of project labor agreement that is expressly authorized by Sections 8(e) and 8(f) of the Act." (Sol. Gen. Brief at 14).

demonstrate how 8(e) and 8(f) create an exception to this rule. In other words, the Petitioners must show that 8(e) or 8(f) expressly authorizes public entities to engage in conduct which the Act otherwise preempts.

The first flaw in Petitioner's argument is that they do not accept this burden, but instead seek to reverse it, claiming that "the Act nowhere expressly prohibits a state or local government from engaging in any particular transactions." (Pet. Brief at 27). According to the Petitioners, this "omission" supposedly suggests that state proprietary actions do not run afoul of the Act.[11] Yet, as has been demonstrated above, this Court has already settled that the Act *does* prohibit the NLRB and other governmental entities from imposing collective bargaining agreements on private employers, whether through proprietary actions or otherwise. *Golden State Transit*, 493 U.S. at 109; *Gould*, 475 U.S. at 291.[12] Viewed in this light, the fact that Sections 8(e) and 8(f) say nothing about the rights of public entities simply leaves intact this Court's presumption that governmental actions are prohibited if they interfere with the process of private sector collective bargaining.

Having overlooked this initial presumption, the Petitioners (and the dissent below) seek to explain Section 8(e) and 8(f)'s use of the term "employer" by observing that these provisions are themselves exceptions from forbidden practices which do not apply to state governments. (Pet. Brief at 27). Again, however, this circular argument only confirms the findings of

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[11] Later, Petitioners assert as a "basic legal principle" that "in the absence of any express indication of a congressional intent to preempt state actions, an inference of such intent is disfavored." (Pet. Brief at 29).

[12] Petitioners' view of the Act is further undermined by the existence of Section 8(d), which has been interpreted as an express prohibition against any attempt by a governmental agency to compel employers to agree to any collective bargaining proposal. *See H.K. Porter, Co. v. NLRB*, 397 U.S. 99, 103 (1970).

the Court of Appeals majority, *i.e.*, that 8(e) has *nothing to do* with what is permitted or prohibited for a governmental actor. Accordingly, 8(e) does not change the underlying prohibition against governmental interference with private sector collective bargaining which this Court has inferred from the Act as a whole.

Next, having wrongly criticized the Court of Appeals for failing to apply section 8(e) to the actions of the MWRA, Petitioners accuse the Court below of improperly "ignoring the fact that the MWRA is not purporting to act as an 'employer' within the meaning of the Act." (Pet. Brief at 28). Yet, it was only because the Petitioners claimed that 8(e) somehow immunized their conduct that the Court of Appeals was constrained to point out that the MWRA failed to meet the terms of the provisions which the Petitioners themselves had identified.

Petitioners are quite correct that the MWRA is not an "employer" within the meaning of the Act and has not acted as one at any point in this case. That concession, however, utterly deprives the Petitioners of any claim to authorization for their actions as a governmental "proprietor". Again, lacking status as an "employer" under the Act, but nevertheless forcing private contractors who *are* employers to adopt collective bargaining agreements, the MWRA can identify no basis for exempting itself from established principles of labor law preemption.[13]

These errors of logic lead the Petitioners to their next faulty premise, that the definition of "employer" in Section 2(2)

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[13] Petitioners again miss this point by asserting that the Court of Appeals' opinion would somehow prohibit railroads and airlines from enforcing union-only project agreements, since they too are not "employers" within the meaning of the Act. (Pet. Brief at 29). There is, of course, no principle of labor law preemption that prohibits railroads or airlines from engaging in *any* activities available to private companies. It is the principles of labor law preemption which prohibit the MWRA from interfering in the process of private sector collective bargaining.

evidences a congressional intent to permit states and their subdivisions "greater freedom" than is available to private entities. (Pet. Brief at 29). Petitioners claim that Congress did not intend the express exemption of the states from obligations under the Act to *decrease* the states' freedom of action. (*Ibid.*).

It is a truism that the NLRA contains no restriction on the conduct of governmental entities towards their own employees. But when a government agency, either a state or the NLRA, purports to coerce private employers in their collective bargaining relationships, then Petitioners are simply wrong: The Act plainly *does* restrict government action in this area.

ABC has already set forth above the language of this Court explicitly holding that the NLRA provides greater protection against governmental conduct which infringes on private action than it provides against the conduct of other private actors. *Golden State Transit II*, 493 U.S. at 110; *Gould*, 475 U.S. at 290. Thus, when the government comes into contact with the private sector, this Court has established the "free zone" around the process of collective bargaining which clearly does impose special restrictions on state actors to prevent them from intruding into that process. Petitioners' arguments have completely overlooked this settled principle of labor law preemption and are fatally flawed.

Finally, the Solicitor General asserts that *Golden State Transit* only prohibits state action which "intrudes upon private conduct that Congress had intended to be unregulated . . . ." (Sol. Gen. Brief at 17). According to the Solicitor, 8(e) and 8(f) show that "Congress chose not to leave unregulated the use of project labor agreements in the construction industry." (*Ibid.*). Hence, state regulation is permitted as well. *See Phoenix Engineering Co. v. MK-Ferguson of Oak Ridge*, No. 91-5527 (6th Cir. June 11, 1992).

This tautological reasoning misreads *Golden State Transit* and the *Machinists* doctrine. The issue in those cases was not

whether "Congress" regulated the process of collective bargaining, but whether Congress intended to allow state or federal agencies to supplement the Act with regulations of their own. *Golden State Transit I*, 475 U.S. at 614-615. Similarly, in *Gould*, the Court noted that the Act authorized private employers to refuse to deal with companies having labor disputes. 475 U.S. at 290. Congress did not authorize public agencies to engage in the same conduct, however, and so state action of this type was held to be prohibited.

So, too, whereas 8(e) and 8(f) clearly authorize certain *private* employer behavior in the construction industry, these provisions say nothing about increasing the power of state agencies or the NLRB to interfere with the process of collective bargaining. Indeed, the Petitioners' reading of the Act is directly contrary to this Court's holding in *NLRB v. Ironworkers Local 103 (Higdon Const.)*, 434 U.S. 335, n.10 (1977), where the Court stated:

> "Congress was careful to make its intention clear that pre-hire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle."

There is simply no basis for saying that Congress's authorization of private conduct constitutes an invitation to either the state or the NLRB to *compel* such conduct.

Thus, Petitioners and their amici have failed to demonstrate that Sections 8(e) or 8(f) of the NLRA provide any basis whatsoever for creating an exception from the well settled preemption of the NLRA. The plain language of the Act establishes that it has no bearing on this case whatsoever, just as the Court of Appeals held.

### B. The Legislative History of Sections 8(e) and 8(f) Does Not Reveal any Congressional Intent to Permit the MWRA's Union-Only Requirement

Having failed to overcome the plain language of Sections 8(e) and 8(f), which establish by their terms that they contain no authorization for government entities to impose collective bargaining agreements on private employers, Petitioners seek to infer such an intent from the legislative history surrounding the 1959 enactment of these provisions. At the same time, Petitioners seek again to rewrite history by claiming without factual support that governmental union-only project agreements were "common" prior to enactment of 8(e) and 8(f) and that Congress should be presumed to have intended those provisions to permit the type of conduct at issue here. Petitioners are utterly wrong in their analysis of Congress's legislative intent, and they are grossly mistaken as to the involvement of public sector construction users in union-only project agreements prior to 1959 or thereafter.

At the outset, it is completely inappropriate to delve into the legislative history of Sections 8(e) and 8(f) when, as shown above, the plain language of those provisions excludes political subdivisions from their coverage. 29 U.S.C. § 2(2). It is a well settled principle of statutory construction that the Court should examine legislative intent only when the plain language of a statute is ambiguous. *FMC v. Holliday Corp.*, 498 U.S. 111, S. Ct. 403, 407 (1990) (requiring adherence to the "language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"); *accord, Morales v. Trans World Airlines, Inc.*,____ U.S.____, 112 S. Ct. 2031, 2036 (1992). *See also West Virginia Univ. Hospitals, Inc. v. Casey*,____ U.S.____, 111 S. Ct. 1138, 1147 (1991) (refusing to permit statutory text to be "expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.").

There is no claim that Section 2(2) of the Act is in any way unclear as to its exclusion of governmental entities from the coverage of Sections 8(e) or (f). Thus, an examination of the legislative intent surrounding 8(e) and (f) is a meaningless exercise, as the Court of Appeals recognized. (MWRA Pet. App. 25a).

Moreover, the types of legislative history most heavily relied upon by the Petitioners and the Solicitor General, *i.e.*, hearing testimony before Congressional Committees which took place nearly a decade prior to passage of the amendments at issue here, and which were not cited in any floor debate by any Congressional sponsor of the amendments leading to Sections 8(e) or 8(f), are the type of legislative history which has previously been identified by this Court as carrying the least possible weight. *See Dept. of State v. Washington Post Co.*, 456 U.S. 595 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history.").

In any event, a review of the random comments parsed out of the record by Petitioners fails to locate enough specific information about the project agreements mentioned to support Petitioners' exaggerated claims. In particular, none of the project agreements referred to clearly imposed union-only agreements on unwilling government contractors. In addition, in none of the projects cited does it appear that the government acted as a party in interest to the agreement, as is true here.

As ABC demonstrated to the Court of Appeals, most if not all labor stabilization project agreements which have been entered into by public sector construction users, prior to recent years, have merely specified certain uniform terms or conditions of employment, and have said nothing about requiring contractors to agree to union representation or sign collective bargaining agreements with such unions. (Jt. App. 113: Md. Harbor Tunnel Agreement).[14]

[14] It is worth reiteration that ABC has never opposed the Project Agreement merely because it establishes specific terms or conditions of employ-

The various projects referred to in the Congressional hearings all appear to be of the "labor standards" type, as opposed to imposing union-only requirements. At best, the sporadic references cited by Petitioners fail to say what type of project agreements are being discussed. *See, e.g.*, Memorandum of NLRB Chairman Reynolds, reporting projects on various public works, none of which apparently involved a union-only project agreement. Hearings on S.1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare, 82nd Cong., 1st Sess. 31, 87,97, 103, 105 (1951). Even the descriptions of "project agreements" set forth in Petitioners' brief fail to refer to any union-only subcontracting clauses, but characterize the normal project agreement as merely standardizing wages and other conditions and perhaps including a no-strike clause.

Even more importantly, none of the public works projects referred to in the remarks selected by Petitioners gives any indication that the *government* acted as a party in interest to the agreements referred to. Absent such evidence, there is certainly no reason to believe Congress intended to authorize government agencies to assume this new role.

In short, the meager references to project agreements on public works identified by the Petitioners simply cannot form the basis for a broad new exemption from the established principles of labor law preemption consistently enforced by this Court for more than thirty years.

Of equal significance, but again overlooked by the Petitioners, is the fact that virtually every state court which had an opportunity to rule directly on local government attempts to impose union-only requirements on construction projects prior

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ment, but has sought to enjoin only those aspects of the Agreement which require private contractors to recognize unions and to adopt collective bargaining agreements. (Jt. App. 37).

to 1959 held such governmental requirements to be unlawful under state and/or federal law. For example, the Court of Appeals of Maryland held in *Mugford v. Mayor and City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1945), that a state government's imposition of union-only requirements in connection with a public construction project "would not only be unlawful but would tend to constitute a monopoly of public service by members of a labor union, which the law does not countenance."

Similarly, in Ohio, the Supreme Court of that state declared that public construction contracts could not be denied to the lowest bidder based solely on the fact that the bidder did not employ union laborers. *State ex rel. United Dist. Heating v. State Office Bldg. Comm'*, 125 Oh. State 301, 181 N.E. 129 (1932). *See also*, *Anthony P. Miller v. Wilmington Housing Auth.*, 165 F. Supp. 275, 280 (D. Del. 1958) (municipal corporation cannot discriminate in favor of organized labor in awarding construction contracts); *Davenport v. Walker*, 68 N.Y. 161 (1901) (board of supervisors enjoined from awarding construction contract to other than lowest bidder because requiring contractor to utilize union labor was violation of public policy); *Elliott v. City of Pittsburgh*, 6 Pa. Dist. Rpts. 455, 456 (1897) (city had no right to designate Building Trades Council of Pittsburgh as only workmen to be employed on city construction work); *Wright v. Hoctor*, 145 N.W. 704 (Neb. 1914) (union labor provision for public works projects unconstitutional and invalid); *Lewis v. Bd. of Education of Detroit*, 102 N.W. 756 (Mich. 1905) (Board of Education has "no power to require contractors constructing public buildings to employ union labor exclusively"); *Adams v. Brenan*, 52 N.E. 314 (Ill. 1898) (board of education enjoined from entering contract providing for union-only labor in school construction because contract discriminates "between different classes of citizens" and is of a nature "to restrict competition and increase the cost of the work").

In Massachusetts itself, the law was clear in 1959, as it is today, that the state could not require public works contractors to sign collective bargaining agreements in order to obtain a state contract. *See* M.G.L. c.30, § 39M, which requires all contracts to be awarded to the lowest responsible and eligible bidder.[15]

Thus, far from confirming Petitioner's claim that "the same kind of contractual arrangements . . . characterized public and private construction projects" prior to the passage of 8(e) (Pet. Brief at 32), these cases show that union-only construction requirements, at the state level at least, were *routinely barred* throughout the country.[16] Based on this public record, and the failure of Congress anywhere to expressly *permit* governmentally mandated collective bargaining agreements, the only logical inference is that Congress had *no* intent to alter the well settled policy of keeping government entities out of private labor negotiations.

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[15] The Massachusetts Supreme Court reaffirmed this prohibition in *Modern Continental Const. Co., Inc. v. Mass. Port Authority*, 369 Mass. 825, 829-30 (1976), holding as follows: "Unionism is not a statutory requirement to be deemed 'responsible' or 'eligible' as those terms are used in M.G.L. c.30, § 39M, and the statute itself would bar automatic exclusion of any bidder on the sole ground that the bidder employs nonunion workers." *Id.* at 829.

[16] As it happens, this was the law in the federal sector as well. *See* 31 Comp. Gen. 561 (May 2, 1952), in which the Comptroller General of the United States declared: "No statute requires the employment of union labor by Government contractors, and generally there would be no legal justification for the rejection of the lowest bid received solely because of the fact that the low bidder may not employ union labor." *See also* 42 Comp. Gen. 1 (July 2, 1962).

### C. The MWRA's Actions Would Not Be Protected by Sections 8(e) or (f) Even if the MWRA Were a Private Owner

The final glaring defect in Petitioner's reliance on Sections 8(e) and 8(f) is that, if the MWRA were somehow allowed to do whatever 8(e) permits a private property owner to do, then the agency's action would *still* be unlawful, because *8(e) does not protect the conduct at issue here.* By its terms, 8(e) allows private construction users to impose union-only requirements only if they are themselves "employers . . . in the construction industry." The NLRA has consistently held that property *owners* are not covered by the 8(e) exemption if they are not in fact "construction industry employers". *See Clark v. Ryan*, 818 F.2d. 1102 (4th Cir. 1987); *Carpenters Local 1149 (American President Lines, Ltd.)*, 221 NLRB 456, 460-61 (1975); *enfd* 81 Lab Cases (CCH) ¶ 13137 (D.C. Cir. 1977); *Columbus Bldg. & Const. Trades Council (Kroger Co.)*, 149 NLRB 1224, 1225-6 (1964). This means they must actually employ construction workers on the project, or at least have a likelihood of employing them by virtue of contractual arrangements. They must also be employers in the "construction industry", not some other field such as waste management.[17]

In the present case, even a fictitiously private MWRA would still fail to meet either of the tests spelled out in 8(e). MWRA is an owner/operator of the Boston Harbor treatment facilities; it is not a construction company. More importantly, it is undisputed that MWRA is not authorized to act as an

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[17] *A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984), a case on which Petitioners erroneously relied in the court below, is not to the contrary. That case held only that an owner who acts as its own general contractor may be deemed to be a "construction industry employer" for purposes of 8(e). *See* 733 F.2d at 854 and n.3, 858. It is undisputed here that the MWRA is acting as neither an employer nor a general contractor on the Boston Harbor clean-up projects.

employer of any workers on this construction project. Thus, even a private MWRA would not be entitled to enter into or enforce a union-only project agreement.

The General Counsel opinions cited by Petitioners make this point clear. In *Morrison-Knudson Co., Inc*, 13 NLRB Advice Mem. Rep. ¶ 23,061 (Mar. 27, 1986) (BCTC Pet. App. 97a), for example, the NLRB's General Counsel declined to issue an unfair labor practice complaint only because she found that the owner of the project, Saturn Corporation, was not a "party in interest in the agreement". The General Counsel also found that no action by the owner was required to implement the agreement in that case.

By contrast, the project agreement here states that it has been negotiated by Kaiser, "acting as agent for the MWRA." (MWRA Pet. App. 75a). Perhaps more importantly, the MWRA's role here is crucial to the implementation of the Agreement, as all contractors must sign the MWRA's Bid Specification 13.1 in order to work on the project. Such activity by a non-construction industry employer is not permitted under Section 8(e). *See also Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-635 (1975) (prohibiting union-only subcontracting agreements between unions and "stranger" contractors, *i.e.*, parties with whom there was no collective bargaining relationship).

Thus, even if the MWRA were granted its wish to be treated like a private owner of a construction project, its actions would be unlawful. Contrary to Petitioners' claims, 8(e) does not permit a private *non*-construction industry *non*-employer to impose union-only requirements on the construction contractors seeking to build its project.

Therefore, Petitioners' attempt to create a special 8(e) exemption from labor law preemption fails utterly to justify the MWRA's imposition of union agreements on private contractors. The plain language of the Act explicitly excludes public

entities from coverage under 8(e); the meager legislative history relied on by Petitioners fails to support their claims; settled law prior to 1959 actually prohibited such governmentally imposed requirements; and a private owner in MWRA's position could not engage in the conduct at issue under 8(e) in any event. For each of these reasons, the Petitioners cannot overcome the Act's existing prohibitions on governmentally mandated union agreements. The Court of Appeals decision must be upheld accordingly.

## III. PUBLIC POLICY COMPELS ADHERENCE TO THE PRINCIPLES OF LABOR LAW PREEMPTION

Contrary to Petitioners' claims, the NLRA's preemption of the MWRA's union-only requirement is not at all "perverse" or "startling", but is in fact the only ruling which is consistent with settled public policy. Allowing governments to coerce collective bargaining agreements in the manner proposed by Petitioners would have severe adverse consequences both for the collective bargaining process and the competitive bidding process in this country.

It has been estimated that 40 percent of all construction work nationwide is government funded. To protect against waste and abuse, every state and the federal government have enacted laws which mandate that competitive bidding procedures be used, as discussed above at p. 28-30, so that work is performed by the lowest responsible bidder. The labor affiliation of contractors has been recognized as having no bearing on ability to perform the work.

By injecting union-only requirements into the bidding/award process, governments would deter from bidding a substantial percentage of contractors who do not wish to deal with labor unions, as has happened in this case.[18] Many

[18] The record evidence establishes that 75% of all construction work is normally performed on a non-union basis nationwide and 60% in Mas-

unionized contractors would also be deterred from bidding because of the unfair leverage which unions are granted during contract renewals covered by this type of Agreement.

The inevitable effect of imposing this arbitrary condition on the competitive bidding process is to increase costs. Not only does this cost inflation occur because unionized construction is more expensive generally,[19] but because limiting the number of bidders on public projects inevitably reduces the competitive incentive to lower bid prices.

In addition, a state-sponsored union-only requirement imposes numerous burdens on employees who do not wish to pay union dues or have union benefit plans substituted for those previously maintained by their employer on their behalf. Particularly minority and female employees who have in the past been denied entry to the industry due to union certification requirements would be adversely affected by government-sponsored forced unionism.

These facts highlight and confirm the reasons why this Court has long distinguished between governmental and private conduct in connection with the collective bargaining process. A private contractor who considers imposing union-only requirements on his subcontractors will be bound to consider market forces and the effect of increased costs on his overall competitiveness. A government agency has no such concerns and is subject instead to the political pressures of well-financed interest groups, such as labor unions.

The desire of government agencies for expedient responses to political influence has no place in the process of private sector

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sachusetts. (Jt. App. 54). Only 21% of all construction workers have chosen to be union members. (*Ibid.*).

[19] The record evidence reveals that the costs of union construction are 20% higher than non-union construction. (Jt. App. 55).

collective bargaining. As noted above, there are many other ways in which government can achieve its legitimate objective of timely completion of public works.[20] It is vital therefore, that this Court preserve and protect the "free zone" of collective bargaining from governmental interference.

## CONCLUSION

For the reasons stated above, the Court of Appeals decision should be affirmed.

Respectfully submitted,

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[20] A government which is truly concerned about union disruption of construction schedules has many devices at its disposal which have proven to be effective. These include increased security, reserved gates, performance bonds and termination for non-performance.